



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Nannette T.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
U.S. Department of the Army,
Agency.

Appeal No. 2020004578

Hearing No. 410-2020-00070X

Agency No. ARCEJACK19APR01326

DECISION

JURISDICTION

On August 15, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 10, 2020 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission VACATES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Civil/Environmental Engineer, GS-0819-14, at the Agency's U.S. Army Corps of Engineers Engineering Division, South Atlantic Division (SAD), in Atlanta, Georgia.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On May 23, 2019, Complainant filed a formal EEO complaint alleging that the Agency subjected her to a hostile work environment and discrimination on the bases of race (African-American), sex (female), and in reprisal for prior protected EEO activity when:

1. On March 19, 2019, she was not selected for the Chief, Business Management Division (BMD) position (Program Manager, GS-0340-15), under Vacancy Announcement No. SCCE181642532397; and
2. On May 3, 2019, she received her performance rating that had been changed and lowered from the rating assigned on February 22, 2019.

Complainant's first-level supervisor was the Chief, Military Integration Division (Caucasian male) S1. He was a witness in an EEO complaint filed by Complainant in 2015. Report of Investigation (ROI), pp. 552-553. Complainant averred that S1 (Caucasian male) has been her supervisor since 2011. S1 acknowledged that he was aware of her EEO activity. Her second-level supervisor was the Director, Regional Business (Black male) (S2). He had been in the Director position since November 28, 2017. ROI, p. 460. Her most recent EEO complaint was settled with a Settlement Agreement dated April 3, 2018. S2 was the settlement authority for her complaint. ROI, pp. 296-303.

Claim 1 – Non-Selection

On October 4, 2018, SAD posted Vacancy Announcement SCCE181642532397. ROI, p. 164. The Vacancy Announcement stated that “assessments for the job will measure Leadership (60%), “Accountability, Conflict Management, Creativity, Innovation Developing Others, Flexibility, Human Capital Management, Interpersonal Skills, and Strategic Thinking.” The Vacancy Announcement also referenced Technical (40%): Leadership, Manage Human Resources, Oral Communication, Property Management and Written Communication.” ROI, 115-116.

The Vacancy Announcement specified that the position was open to: Current Department of Army Civilian employees and Current Permanent Department of Defense (DOD) Civilian Employees (non-Army). ROI, pp. 431-432. In addition, applicants must have held a General Schedule (GS) position within the last 52 weeks and must have 52 weeks of Federal service at the next lower grade or equivalent. On October 22, 2018, Complainant applied for the Chief, BMD position.

Complainant had served in the Chief, BMD position on multiple occasions, including 120 days from May 2018 to September 2018. Complainant averred that her resume reflected 30 years of diverse leadership experience. She averred she had experience in the BMD job duties identified in the Position Description and in the Vacancy Announcement. Complainant referenced her FY 2019 performance appraisal where her supervisor noted her “superior performance while acting as the Chief.”

In addition, the appraisal stated that she “exercised leadership and support[ed] the Regional Business Director in key deliverables” and that she performed a “superb job in overseeing the preparation, development and writing of the strategic plan and operational order” of significant programs. She claimed she served 1.5 years as Chief/Supervisory Program Manager of the Business Management Division where she and her staff modified and updated the FY 2018 SAD Strategic Plan.

Thirty-one candidates, including Complainant, were referred for the job. ROI, pp. 161-163, 207-209. A five-member panel was convened. The record shows the following information: S2 served as the chairperson to the selection panel. The panel included four others: SAD Director of Programs, SES Panel Member (Caucasian male) (PM1); Colonel (Caucasian male) (PM2); District Commander, Deputy Director (Caucasian female) (PM3) and Program Manager (Caucasian female) (PM4). Members of the Panel independently reviewed and ranked the candidates. The final interview list of six included Complainant.

Four interviews were conducted in person and two were conducted by phone. The two conducted by phone included the selectee and a female candidate who was stationed in Korea. A total of 45 minutes was allotted for the interview. Complainant claimed that her interview time was cut short as she was given 35 minutes and the interview was interrupted by an alarm. The Agency disputes her claim that her time was cut short. The Agency states that Complainant did not perform well during the interview and ran over her allotted time.

The record included the final Ranking Spreadsheet. ROI, p. 205. It does not reflect the individual panel member’s notes. That ranking sheet shows that Complainant had been ranked higher than the selectee and the alternate by two of the five panel members. ROI, p. 494. S2 gave Complainant low scores that placed her below the selectee. ROI, p. 494.

As panel chair, S2 created the recommendation packet which was coordinated with the other panel members. The panel recommended the selectee and an alternate (African-American female, no prior EEO). S2 stated that Complainant lacked much of the desired experiences related to the various management processes, theories and techniques. ROI, p. 466. The record shows that the first alternate primarily worked in one district in a few functioning areas with supervisory experience limited to a branch with one functional area. ROI, p. 466.

The Major General was the selecting official (SO). ROI, pp. 123, 194. SO said she did not select Complainant because she was not recommended as the primary or the alternate selectee. The SO concurred with the panel’s recommendation on the selectee. She acknowledged that the selectee was not a member of the organization, but she averred “he best demonstrated how he would improve our business process.” ROI, p. 564

The selectee was a retired military officer (White male, no prior EEO). As an outside hire, the Agency sought and received a waiver to hire in advance of the 180-day waiting period. To justify the waiver and to be compliant under Agency policy, there must be a showing that “no other qualified civilian employee could successfully perform the job.”

The affidavit of the HR Manager stated “the selection was not in compliance with [Agency] Regulation 690-300, because there were multiple delays in filling the job, there was no documentation why the delays occurred, and ...Complainant’s race and sex could have been factors in her non-selection because she could have performed the job without a waiver that was given to [the selectee]. [Complainant] was detailed to work in the position multiple times with a successful rating while doing so.” ROI, pp. 668-670.

In this case, Complainant claimed that a waiver was sought to hire a less qualified retired military member, rather than hire an African-American woman. ROI, p. 232. Complainant says the online assessment is missing, as was the Managerial Situational Judgment Test, which is considered as part of the overall selection process. ROI at 484. She asserted that there is a pattern of systemic discrimination based on race and sex within SAD and that African-American females are denied a fair and equal opportunity to be selected for GS-15 Division Chief positions. She says SAD gives an unfair advantage and preference to military officers, bypassing qualified African American women for GS-15 vacancies. Complainant claimed that reportedly SAD senior management officials stated African-American females would never be selected for GS-15 positions within the Division because they are aggressive and hard to get along with.

Claim 2 – Performance Rating

On February 22, 2019, S1 signed a Performance Progress Review for Complainant as both the rater and the higher-level reviewer for the Performance Element 4 standard for the Chief BMD position from May to September 2018. ROI, 541. The progress narrative was laudatory.

On May 3, 2019, Complainant received her performance rating that rated her as “Fully Successful.” The wording had been changed and was not as laudatory from the wording given on February 22, 2019, during her progress review, which was prior to her EEO contact on this case. It is undisputed that some language in Complainant’s final evaluation was different from her mid-point evaluation. Complainant claimed that the Agency changed the performance appraisal narrative approved by her higher-level reviewer on February 22, 2019, which cited her “Superior performance while Acting as Chief, Business Management Division” and for which she received an “Exceeds the Standard” on Standard 4 to a Fully Successful rating. Complainant stated that the changes occurred seven months after the temporary assignment had been completed, as an act of reprisal. In Standard 2, S1 noted that Complainant “confronted the [Deputy for Program Management] in a manner that required the Commanding General to intervene and terminate the interaction.” Complainant claimed that the Agency fabricated this scenario to justify the changes to her rating based on a confrontation that did not occur. S2 averred that the evaluation was at the Fully Successful level, because Complainant had not provided employee input. S2 concurred in the evaluation issued by S1.

Complainant stated that she is challenging management’s actions linked to her performance appraisal which “have the expressed purpose of injuring my opportunity for promotion, performance awards, and other forms of recognition because of my race, plus gender and retaliation for previous EEO complaints.”

She claimed that the Agency has set her performance standards in a way that she cannot achieve recognition beyond the Fully Successful level. Her supervisor stated that the rating reflected his assessment of her performance. She disputed the Agency's reference to a confrontation as support for the rating. ROI, p.555.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The AJ assigned to the matter issued a summary judgment decision in favor of the Agency. In the decision, the AJ determined that Complainant failed to present sufficient evidence to establish discrimination. The Agency subsequently issued a final order fully implementing the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant, who is pro se, maintains that the AJ erred in entering summary judgment in favor of the Agency. She asserts the Agency by its own admission failed to accept and fully investigate all of the claims she presented. She claims that the Agency did not address her claims of systemic discrimination against African-American women and did not include in the record relevant information regarding the results of the Leadership Competency Assessment, the panel member individual ratings, and notes. She claims there are credibility issues and conflicting affidavits and genuine disputes, regarding the knowledge and involvement of the named management officials and the tactics used by the Agency to deny African-American females an equal opportunity to be considered and selected for the GS-15 positions at the Agency. She disputes that her Fully Successful rating was warranted. She noted that the Human Resources Specialist stated that the selection process was flawed. Further, she noted that the Agency selected a white male from outside of the Agency, rather than select a qualified African-American woman. Accordingly, Complainant requests that the Commission reverse the final order.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255.

An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case.

After a careful review of the record, we find that the AJ improperly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a summary judgment was inappropriate. Complainant asserted that there is a pattern of systemic discrimination based on race and sex with SAD and that African-American females are denied a fair and equal opportunity to be selected for GS-15 Division Chief positions. She claimed that SAD gives an unfair advantage and preference to men, bypassing qualified African-American women for GS-15 vacancies.

With regard to claim (1), Complainant questioned the legitimacy of the stated reasons because they were inconsistent with Agency policy. Looking at the evidence in the light most favorable to Complainant, the undisputed record shows that the Agency bypassed not only Complainant, but the next in line (alternate selectee) who was another African-American woman. The Human Resources Specialist averred this was not in compliance with the Agency protocol. ROI, pp. 668-670. It was undisputed that Complainant was an employee within the organization who was available and qualified for the position. Complainant asserted that she had served successfully in the Chief BMD position and received favorable evaluations. Yet, the White male selectee was preferred and hired from outside.

The Agency said Complainant's responses to the interview questions were not as strong as the selectee's, but the record does not contain the contemporaneous interview notes or the scoring sheets. Further, Complainant maintains the record is missing relevant information about the results of the Leadership Competency Assessment, the Managerial Situation Judgment Test, the panel members individual ratings and the interview notes for the Chief BMD, as requested by the investigator. In addition, there is a dispute as to whether Complainant's interview time was cut-short.

Regarding claim (2), the Agency explained that the removal of the specific wording from the Progress Review to the final review is a natural result of supplying more specificity on the details of an individual's performance. Complainant disputed this reason as another act of reprisal and raised a credibility issue. ROI, p. 560. It is disputed whether any confrontation took place, which was a stated reason for the change in the narrative of her evaluation. Even if the rating was not changed, the narrative was changed, to the detriment of Complainant. In addition, S2 said Complainant did not provide input into the progress review. ROI, p. 532. Complainant attested that she submitted input to the performance appraisal. ROI, pp. 626-633.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-

110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). “Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims.” Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, co-workers, and Complainant, herself. Therefore, summary judgment in favor of the Agency should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including the Agency's arguments on appeal, Complainant's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter for a hearing in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the Atlanta District Office within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Atlanta District Office. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

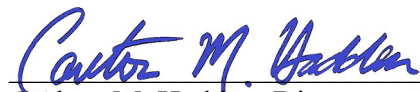
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 27, 2022

Date